



January 31, 2001

Ms. Elaine S. Hengen
Assistant City attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2001-0368

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 143889.

The City of El Paso (the "city") received a request for "a copy of the file and complaint" made by a named individual against the city's police department. You have submitted for our review information that is responsive to the request. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert section 552.103 for the entirety of the submitted information. Section 552.103 excepts from disclosure information:

relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

[Information is excepted from disclosure] only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through

discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, the city must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. See Gov't Code § 552.103(a), (c); see also *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

You contend that the city reasonably anticipated litigation at the time of the request. In situations where a governmental body asserts section 552.103 and contends that litigation is anticipated, this office has determined that mere conjecture that litigation may ensue is insufficient to invoke the protection of section 552.103, and that the governmental body must provide this office with *concrete evidence* to show that litigation is realistically contemplated. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d at 481; Attorney General Opinion JM-266 at 4 (1984); Open Records Decision Nos. 518 at 5 (1989), 328 at 2 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). You base your contention of anticipated litigation on the following factors: 1.) that the requestor has retained an attorney who has made the present request, and 2.) the attorney's statement in the request letter that he is representing the named individual in her "claim" against the city police department for "excessive force and possible brutality." This office has found that the fact that a prospective plaintiff has hired an attorney who then makes a request under the Act is alone insufficient to trigger the protection of section 552.103. Open Records Decision No. 361 at 2 (1983). This office has also declined to apply the litigation exception where the prospective plaintiff made public threats to sue, but took no further action towards litigation. Open Records Decision No. 331 at 1 (1982). You do not assert that any individual has threatened litigation in the matter. On the other hand, this office has applied the litigation exception where an individual hired an attorney who then made a demand for disputed payments and threatened to sue if payments were not made promptly. Open Records Decision No. 346 at 2 (1982). However, you do not assert nor does the information indicate that the attorney in the present request has alleged damages or has made any demands of the city. We conclude in this instance that, for purposes of the applicability of section 552.103, you have not sufficiently demonstrated that the city reasonably anticipated litigation at the time the city received the present request. Accordingly, we find that the information is not excepted from disclosure by section 552.103.

You also assert that portions of the information you describe as criminal history compilations are excepted from disclosure under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information

contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). In this instance, portions of the submitted documents contain compilations by the city identifying one or more named individuals as a suspect or alleged offender. We do not agree, however, that all of the information you have marked is excepted from disclosure in this instance. Where the information pertains to the requestor's client, the requestor has a special right of access to the information. *See Gov't Code § 552.023*. However, as to the compilations regarding individuals other than the requestor's client, we conclude that you must withhold this information under common law privacy as encompassed by section 552.101 of the Government Code, and we have marked the documents accordingly.

You also assert section 552.130 as excepting certain highlighted information contained in the submitted documents. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit
issued by an agency of this state; [or]

(2) a motor vehicle title or registration *issued by an agency of this state[.]*

Gov't Code § 552.130(a) (emphasis added). We believe the purpose of this provision is to protect an individual's privacy. Accordingly, as provided by section 552.023 of the Act, the driver's license number, vehicle identification number, and license plate number of the requestor's client is not excepted in this instance under section 552.130 because the requestor has a special right of access to this information. We also note that section 552.130 does not apply to driver's license or vehicle title or registration information of states other than Texas. Thus, the information you have highlighted pertaining to the requestor's client or other states is not excepted under section 552.130. However, you must withhold under section 552.130 the *Texas* driver's license numbers, vehicle identification numbers, and license plate numbers of individuals other than the requestor's client. We have marked samples of the information that is excepted in this instance under section 552.130.

In addition to the exceptions you have asserted, we note that some of the information must be withheld under section 552.117 of the Act, and that the social security numbers of individuals, other than the requestor's client, may also be subject to required redaction under section 552.101. Pursuant to section 552.117(2), the city must redact from the documents information that reveals the home address, home telephone number, and social security

number information of a peace officer, as well as any information that reveals whether the officer has family members. Section 552.117(2) also encompasses an officer's *former* home address and telephone number. *See* Open Records Decision No. 622 (1994). A social security number must be withheld under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in the submitted documents were obtained or are maintained by the city pursuant to any provision of law enacted on or after October 1, 1999. However, we caution that the Act provides for criminal penalties for the improper release of confidential information. *See* Gov't Code § 552.352. We have marked the documents accordingly.

In summary, none of the information is excepted under section 552.103. The city must withhold the compilations of criminal history information we have marked pursuant to section 552.101, and may be required to redact the social security numbers we have marked under section 552.101, as provided above. Section 552.130 requires the city to redact the *Texas* driver's license numbers, vehicle identification numbers, and license plate numbers of individuals other than the requestor's client. Section 552.117(2) requires the city to redact the social security numbers, home addresses, home telephone numbers, and family member information of peace officers. The remaining information is subject to release to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

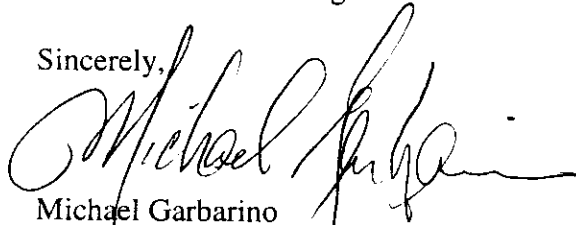
body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 143889

Encl. Submitted documents

cc: Mr. Gary A. Aboud
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(w/o enclosures)